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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 749

LAWRENCE N. ADLER, Petitioner

v.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, Respondent

RESPONSE ON BEHALF OF PETITIONER

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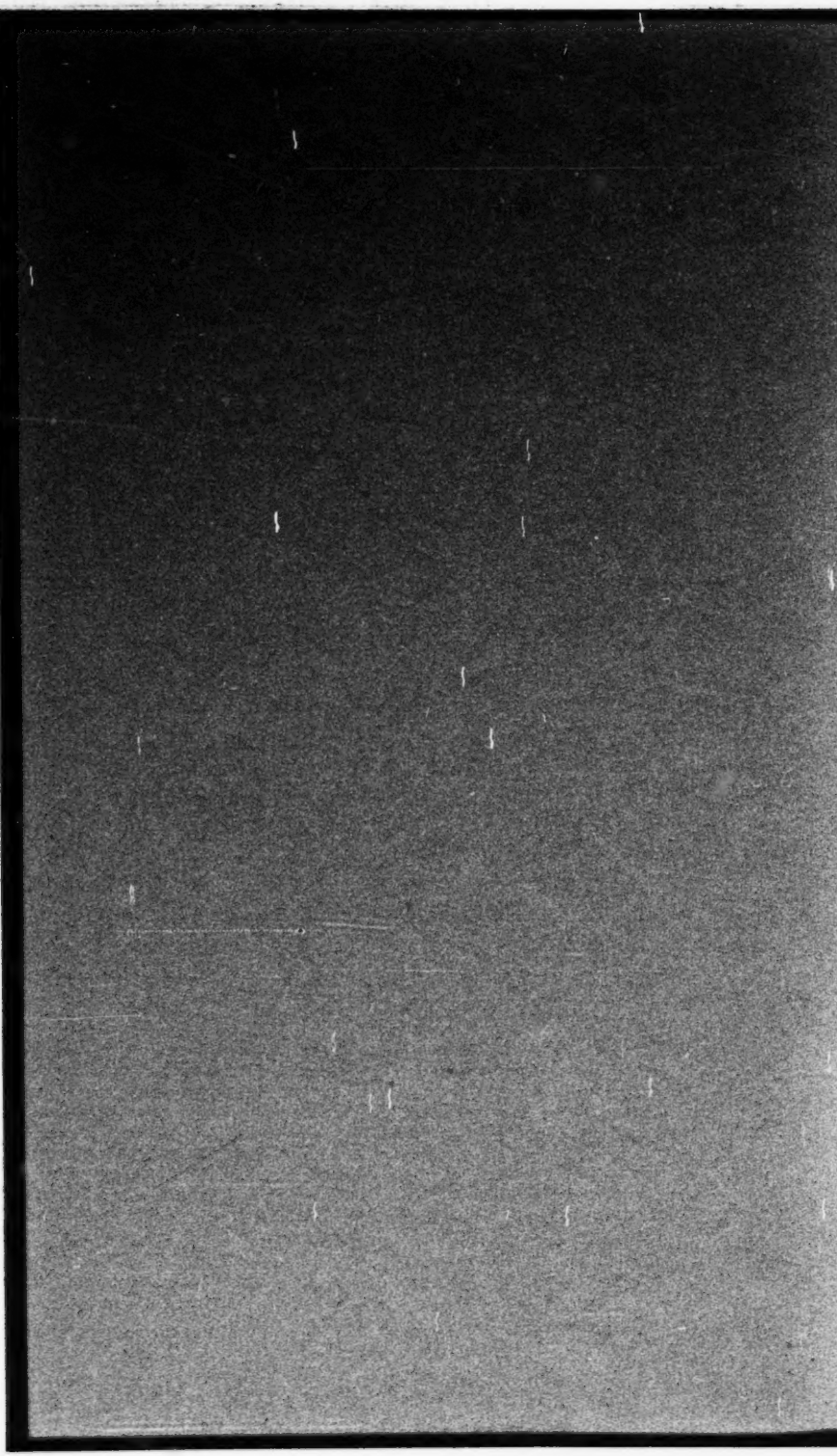

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The Petitioner, Lawrence N. Adler, pursuant to Rule 24(4) of this Court, respectfully submits the following Reply to the Respondent's Answer to Petition for Writ of Certiorari.

STATEMENT

The Petitioner, Lawrence N. Adler, filed a Petition for a Writ of Certiorari, No. 749, October Term, 1973, with this Court in order to seek judicial review of four questions of major importance not only to Petitioner but also to physicians, patients and hospitals across the nation. In that Petition Dr. Adler did not precisely detail the legal merits to his various claims, but placed primary emphasis on the importance of the case being reviewed by this Court. Unfortunately the Answer filed by the Respondent dwells heavily on factual assertions which have not been accepted by the lower courts and which are, therefore, inappropriately raised before this Court. There is moreover a suggestion that this Court lacks jurisdiction which requires some brief response.

RESPONSE

A. Jurisdiction

Respondent has suggested in its Answer that the only basis for jurisdiction of this Court is the Stipulation entered into before the Court of Common Pleas of Allegheny County (Answer 2-3).* This suggestion on the part of the Respondent is not supported by the actual record. The Stipulation with respect to state action (Appendix 100a) and the admission made by the

*References to Respondent's Answer to Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania are cited as (Answer). References to the Appendix to the Petition for Writ of Certiorari are cited as (Appendix). References to the printed record filed before the Supreme Court of Pennsylvania are cited as (R.).

Defendant in its Answer (Appendix 95a) were fully supported by an ample record developed in the court below. In addition to having received in excess of $1,500,000 under the Hill-Burton Act, the Hospital received capital funds under the accelerated Public Works Program and under the Appalachian Program. Moreover a full record was made with respect to the operating income of the Hospital. In addition to operating income figures, the Court of Common Pleas had before it the agreements between the Hospital and the University of Pittsburgh Medical School which is a state related university. Among other things, this agreement gave the University rights with respect to hospital staff appointments. Petitioner is prepared to demonstrate in its brief on the merits, should certiorari be granted, that the Stipulation relied upon by the Pennsylvania Supreme Court in passing on the Fourteenth Amendment questions raised by this case is amply supported in the record.*

B. Matters Not Supported by Findings of the Courts Below

Without regard to the inappropriateness of Respondent's remarks concerning Petitioner, there is serious objection to making assertions in petitions or answers filed in this Court which are not based on the record or which do not accurately reflect the findings of the court below. In three specific

*While the Supreme Court of Pennsylvania accepted the Stipulation with respect to "state action" and did consider the Fourteenth Amendment questions raised by Petitioner, the Court, unfortunately, was in error when it referred to a "paucity of data in the record" to support the stipulation (Appendix 10a). This may be the fault of both counsel since the supporting material available to the trial court and contained in the record was never specifically referred to in the briefs filed in the Pennsylvania Supreme Court. However, since the Pennsylvania Supreme Court had jurisdiction of the appeal on state grounds, neither party needed to brief the "state action" issue in detail.

instances the Answer filed by the Respondent does not accurately reflect the evidence and the findings of the court below.

Shortly after Petitioner sought a review of the Hospital decision forbidding him to use the cardiac catheterization facilities of the Hospital, he was discharged from employment as the director of the Coronary Care Unit of Respondent Hospital. At that time certain members of the Hospital management did make accusations of misconduct against the Petitioner. The issue of Petitioner's firing by the Hospital was never litigated. The courts below were careful to find that, in addition to the fact that no challenge had been made as to Petitioner's discharge as an employee, mere *allegations* existed as to supposed misconduct. Unfortunately, despite the careful language of the findings of the Court of Common Pleas of Allegheny County (Appendix 48a) and of the Majority Opinion of Pennsylvania Supreme Court (Appendix 5a) reflecting their recognition that accusations of misconduct were mere unproven allegations, Respondent has chosen to treat the termination of Petitioner's employment as arising out of proven misconduct (Answer 10-11).

Likewise Respondent has devoted considerable space to allegations that Petitioner actively formulated the policy now in dispute. Again, the statements contained in Respondent's Answer do not measure up to the carefully drafted findings of the Court of Common Pleas of Allegheny County on this issue. (Note especially Finding 19, Appendix 39a.*)

*Even these findings by the Court of Common Pleas were vigorously disputed by Petitioner. Accepting, as we must, the court's finding that Petitioner participated in the decision to deny the oral request of the medical partner of a physician desiring to perform occasional procedures, such conduct would never bar Petitioner from raising the constitutional issues which now are presented by this petition. *Abie State Bank v. Weaver*, 282 U.S. 765 esp. at 772-777 (1931) and *Ex Parte Garland*, 71 U.S. 333 (1866).

Finally, it is asserted that Petitioner's interests in this litigation are purely parochial and selfish interests. While this argument has been made at every level in these proceedings by the Respondent Hospital, neither of the courts below have accepted this characterization of Petitioner's motivation. In point of fact it is clear that Petitioner cannot make as much personal income from the performance of time consuming procedures in a cardiovascular laboratory as he can derive from a busy office schedule and consulting practice as a cardiologist.

C. Legal Considerations

Petitioner will not respond to the detailed arguments set forth at pages 12-24 of Respondent's Answer other than to note that Respondent again clearly equates the regulation promulgated by the chief of medicine at Respondent Hospital with a legislative or administrative enactment of a duly constituted federal or state legislature or other public authority (Answer 15). It is precisely the conduct of private corporations or agencies like the Respondent who are engaged in implementing public, state and federal programs which gives rise to the questions which Petitioner respectfully submits ought to be reviewed by this Court.

Respectfully submitted,

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